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Nos. A-370 and 90-767

In the Supreme Court of the United States

OCTOBER TERM, 1990

CABLE NEWS NETWORK, INC., ET AL.,
APPLICANTS-PETITIONERS

v.

MANUEL A. NORIEGA, ET AL.

ON APPLICATION TO STAY THE ORDERS OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA TEMPORARILY BARRING PUBLICATION OF TAPE RECORDINGS BEFORE IN CAMERA REVIEW PENDING CONSIDERATION OF A PETITION FOR A WRIT OF CERTIORARI AND ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the First Amendment prohibited the district court from temporarily barring petitioners from publishing tape recordings of conversations between respondent, a criminal defendant awaiting trial, and his attorneys, before submission of those tape recordings for an in camera review, in order to enable the court to make the factual findings necessary to determine whether a prior restraint on publication is permissible.

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OPINIONS BELOW

The opinion and order of the court of appeals (Pet. App. 1a-17a, 18a) are not yet reported. The orders of the district court (Pet. App. 19a-24a, 25a-29a) are not yet reported.

JURISDICTION

The judgment of the court of apeals was entered on November 10, 1990. The application for a stay

of the district court's orders and the petition for a writ of certiorari were each filed on November 15, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 2101(f).

STATEMENT

1. Respondent Manuel A. Noriega, a defendant awaiting trial on federal criminal charges pending before the United States District Court for the Southern District of Florida, is currently detained at the Metropolitan Correction Center (MCC), Dade County, Florida. On November 6, 1990, applicants-petitioners, Cable News Network, Inc., and its parent corporation, Turner Broadcasting Systems, Inc. (collectively petitioners), notified Noriega's attorneys that they were in possession of seven tape recordings of telephone conversations that Noriega had while he was housed at the MCC.[1] Petitioners played a portion of one of those tapes for Noriega's lead counsel, who identified the conversation on the tape as one between Noriega and a legal assistant and interpreter in his office. Pet. App. 2a-3a, 30a-31a.

As a result of petitioners' disclosure, Noriega filed on November 7 an emergency motion for an injunction in the district court. Noriega sought an order "prohibiting [petitioners] from broadcasting any tape recording of any communication between General Manuel Antonio Noriega and any of his lawyers

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[1] The Bureau of Prisons, as a matter of prison security, routinely monitors the telephone conversations of all inmates and so informs all inmates. Conversations with attorneys are not monitored when the inmate notifies prison authorities that he wishes to speak privately. See Pet. App. 14a-15a, 77a-78a; see also *id.* at 141a-146a (release signed by Noriega).

The record contains no information regarding the origin of the tape recordings petitioners obtained.

or his staff." Pet. App. 32a.[2] The district court held a hearing the next day, November 8. Pet. App. 71a-100a.

2. a. At the conclusion of the hearing, at which counsel for petitioners, Noriega, and the government entered appearances, the district court entered an order temporarily enjoining petitioners from publishing any of the tapes that contained privileged attorney-client communications. The court's order did not apply to conversations that did not contain such privileged communications. Pet. App. 83a, 86a; see *id.* at 25a.[3]

b. Later that day, the district court entered a written memorandum order and decision explaining its temporary injunction. Pet. App. 19a-24a. At the outset, the court noted that

> the issue it confronts is unprecedented. The court is aware of no case, and none has been presented to it, in which a member of the press sought to broadcast an otherwise privileged attorney-client communication.

Id. at 19a. As the court viewed the issue, the case presented "a conflict between Noriega's right to a

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[2] Noriega's motion emphasized that "the objection made is not to [petitioners'] right to broadcast a story, but specifically their right to play a particular attorney/client privileged communication." Pet. App. 31a.

[3] The court had also directed petitioners to produce the tapes for in camera review, but stayed that portion of its order. See Pet. App. 87a, 94a-97a.

During the hearing, the court directed the government to refrain from monitoring "further conversations between the lawyers, their representatives and [Noriega]." Pet. App. 86a. The court also received from the government "under seal a list of the telephone calls [Noriega made from the MCC]." *Id.* at 94a.

fair trial and the First Amendment prohibition against prior restraints." *Id.* at 21a. The court recognized the gravity of prior restraints: "The right of the press to be free of prior restraints on speech is, of course, at the very core of the First Amendment." *Ibid.* For that reason, the court observed, "[a] prior restraint is presumptively unconstitutional." *Ibid.* (citing *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415, 419 (1971)).

The court acknowledged that Noriega "bears a heavy burden to prove that a prior restraint is justified, and that a prior restraint can issue only where the danger of disclosure is clear, immediate, and irreparable." Pet. App. 22a. Following this Court's decision in *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 562-568 (1976), the court explained that "the determination of when prior restraint is justified where it conflicts with the right of fair trial must rest upon factual findings based on the contents of the speech at issue." Pet. App. 23a. Specifically, the court stated that its task under *Nebraska Press Ass'n* would be to determine "whether the nature and content of the disclosure [of alleged defense and confidential trial strategy] would impair the right to a fair trial, whether any less drastic means * * * would mitigate the effects of the disclosure, and whether a prior restraint would effectively prevent the harm." *Ibid.* Here, the court pointed out, "the contents of [petitioners'] tapes are not before the court, and therefore it is impossible to determine, at this stage, the precise extent to which Noriega's right to a fair trial would be hampered by disclosure." *Ibid.*[4]

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[4] In these circumstances, and based on Noriega's allegations and petitioners' concessions, see Pet. App. 20a, the district court assumed that "at least some of the tapes contain discus-

Accordingly, the court ordered that "the temporary injunction imposed on [petitioners] * * * is continued until such time as [a designated United States magistrate reviews the tapes] * * * [to] determine whether anything contained in the recordings presents a clear, immediate, and irreparable danger to [Noriega's] right to a fair trial." Pet. App. 23a. The court directed petitioners to provide copies of the tapes to the magistrate for that purpose. *Id.* at 23a-24a.

c. Petitioners did not comply with the district court's directive. Instead, petitioners on November 8 noted an appeal from the district court's order temporarily enjoining publication of the tapes, Pet. App. 37a-40a, and filed an emergency motion in the court of appeals for "immediate consideration and vacation of [that] order," *id.* at 41a.

3. a. On November 9, the district court entered a supplemental order in which it further explained the basis for the temporary relief it had entered the day

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sions of witnesses, evidence, and certain other aspects of Noriega's defense," *id.* at 23a. This the court viewed as implicating constitutional concerns with respect to the attorney-client privilege in the context of a criminal case, since the privilege "serves to protect a criminal defendant's Sixth Amendment right to effective assistance of counsel by ensuring unimpeded communication[s] and disclosure by the defendant to his attorney." *Id.* at 20a. The existence of the tape recordings had, in the court's view, already frustrated that underlying purpose of the privilege. No broadcast restraint would, in the court's analysis, be justified on that ground alone for it would merely be "symbolic and prophylactic as far as this aspect of the attorney-client privilege is concerned." *Id.* at 21a. The court's concern was therefore focused on the injury flowing from dissemination of the defense's theory of the case and its trial strategy. "In this sense, the issue is really one of the right to a fair trial rather than the attorney-client privilege per se." *Ibid.*

before. Pet. App. 25a-29a. The court reiterated that the

> test for determining whether a prior restraint can issue where the right to a fair trial is at stake requires conclusions as to 1) whether the right to a fair trial would be impaired, 2) whether less restrictive alternative measures short of prior restraint are sufficient, and 3) whether a prior restraint would effectively prevent the harm.

Id. at 26a (citing *Nebraska Press Ass'n*, 427 U.S. at 562-568).

That test, the court pointed out, requires a factual inquiry. Yet because the contents of the tapes were not before the district court, the court "was in effect being asked to make a factual determination without being allowed to review the facts." Pet. App. 26a. Noting that petitioners have the tapes but have resisted turning them over to the court for review, the court remarked that it

> seems fundamentally unfair to allow [petitioners] to benefit from [their] refusal to disclose the contents of the tapes to the court—that is, to allow [petitioners] to argue that no prior restraint should issue because no clear and immediate harm is apparent when the only reason that no clear and immediate harm yet appears is because [petitioners have] so far prevented this court from reviewing the content of the tapes in [their] possession.

Ibid.

Turning to petitioners' contention that the court should look to the government to produce the tapes, the court explained that obtaining all the tapes in the government's possession would not identify the ones

in petitioners' possession, and might not even include all the tapes petitioners have. Pet. App. 26a-27a & n.1. This case, the court stated, is different from other prior restraint cases because here it is impossible for the court to make a determination whether publication would clearly and immediately harm the competing right at stake "without knowing the precise contents of the speech sought to be restrained." *Id.* at 28a. The court specifically contemplated an "expedited review" of the tapes in question before the magistrate and emphasized that its order "was not a decision on the merits of [Noriega's] request for injunction." *Id.* at 27a. The court therefore ordered that the temporary restraining order remain in effect for the period necessary for the magistrate to review the tapes, not to exceed ten days. *Id.* at 28a-29a.

b. Petitioners on November 9 promptly noted another appeal from the district court's supplemental order temporarily enjoining publication of the tapes, Pet. App. 44a-45a, filed another emergency motion in the court of appeals for "immediate consideration and vacation of [that] order," *id.* at 46a, and sought a stay of the district court's order pending appeal, *id.* at 49a-53a.[5]

4. On November 10, the court of appeals—treating petitioners' appeals from the district court's written orders prohibiting publication as a petition for a writ of mandamus—denied relief. Pet. App. 1a-17a.[6]

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[5] The court of appeals consolidated petitioners' separate appeals from the district court orders and directed the government and Noriega to file briefs on the issues presented. Pet. 8; Appl. 7.

[6] Petitioners do not appear to challenge the court of appeals' characterization of their case. See Pet. 4 & n.4. The

The court of appeals acknowledged that this case "presents a difficult question regarding the District Court's responsibility to balance the Sixth Amendment right to a fair trial of [Noriega], with [petitioners'] First Amendment right to be free from prior restraints against the broadcasting of newsworthy information." *Id.* at 2a. And in discharging that responsibility, the court stated, "the trial court is accorded broad discretion to accomplish its primary responsibility of ensuring that the accused has a fair trial." *Id.* at 7a.

The court of appeals recognized that "[n]otwithstanding the District Court's broad discretion in determining First Amendment interests with respect to a criminal defendant's Sixth Amendment right to a fair trial, a general, conclusory representation that publicity might deprive a defendant's right to a fair trial is insufficient." Pet. App. 10a (citing *Press-Enterprise Co.* v. *Superior Court*, 478 U.S. 1 (1986)). To the contrary, the district court's determination "must be definitively and explicitly stated based on

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court of appeals also held, as a threshold matter, that it lacked jurisdiction over petitioners' appeal from the district court's initial oral order, and accordingly dismissed that appeal. Pet. App. 3a & n.1; *id.* at 18a. Petitioners have not sought further review of that aspect of the court of appeals' judgment.

On the evening of November 9, petitioners aired a news report that included the tape initially disclosed to Noriega's lead counsel. Pet. 7; Pet. App. 54a-55a. As a result, on November 10, Noriega filed a motion with the district court to hold petitioners in contempt. Pet. App. 102a-107a. Petitioners promptly filed in the court of appeals another emergency motion to enjoin the district court from holding a contempt hearing. The court of appeals denied that motion. *Id.* at 3a, 17a. Petitioners have not sought further review of that motion. See also note 8, *infra*.

the particular facts and circumstances of this case." Pet. App. 12a.

The court of appeals thus held that "it is essential that the District Court delineate carefully its reasons for proscribing the broadcasting of the tapes in question, * * * [and that] [p]articular attention should be given to the Sixth Amendment concern for an impartial jury." Pet. App. 12a. Accordingly, the court, noting its concern with petitioners' "refusal to obey the * * * order to release the tapes in question to the court," concluded that the district court "must possess the subject tapes in order to make its *in camera* determination of whether the attorney-client communications are privileged." *Ibid.*[7]

In sum, the court of appeals concluded that

> the First Amendment interests of the press and the public will be best served by immediate production of the tapes held by [petitioners] so that the District Court can conduct the difficult balancing of constitutional rights required under these circumstances; an obligation which the District Court is required to discharge.

Pet. App. 16a. In the present circumstances, the court determined, it is "required to speculate as a result of [petitioners'] refusal to produce the tape recordings." *Ibid.* As the court observed in closing, "[n]o litigant can continue to violate a district court's or-

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[7] In that regard, the court of appeals also concluded that

> [w]hether or not the telephonic communications between Noriega and his defense counsel are privileged, while not necessarily determinative of whether such communications should be publically broadcast, would be relevant to the District Court's assessment of potential harm to Noriega's right to a fair trial.

Pet. App. 15a-16a.

der and attempt to have that district court's order reviewed at the same time." *Ibid.*

5. On November 15, after further proceedings in the district court,[8] petitioners filed this application for a stay of the district court's orders (No. A-370), together with their petition for a writ of certiorari (No. 90-767).

ARGUMENT

Despite the broadside attack on the district court's orders leveled by petitioners (Appl. 10-32; Pet. 8-31) and their amici (New York Times Br. 8-18; American Society of Newspaper Editors Br. 1-20), this case does not require the Court to address the broad question whether an injunction against publication is justified on the basis of the record made to date. The district court has not permanently enjoined petitioners' publication of the Noriega tapes. To the contrary, the district court carefully crafted its orders for the limited and specific purpose of providing the court a brief period within which to carry out its "expedited review," Pet. App. 27a, to make promptly the factual

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[8] On November 12, after the court of appeals' decision, the district court held a hearing on Noriega's outstanding motion for civil contempt against petitioners. Pet. App. 108a-140a. At that hearing, petitioners advised the district court that they had "no intention to telecast any attorney-client privilege conversations until [they] get relief from the Supreme Court." *Id.* at 111a. Moreover, petitioners and Noriega, with the district court's approval, agreed at that time to abide by the district court's temporary injunction barring publication of the tapes and the stay of the district court's order directing petitioners to produce the tapes for in camera review (see note 3, *supra*), pending this Court's disposition of petitioners' application for a stay and petition for a writ of certiorari. See *id.* at 124a, 138a; Pet. Supp. App. 17-21. In light of these developments, the district court has taken no further action on Noriega's pending contempt motion against petitioners.

findings that this Court has indicated are necessary predicates for a restraint on publication in a case in which fair trial rights are at issue. *E.g.*, *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 562-568 (1976). In other words, the question presented here is quite narrow—whether the First Amendment prohibited the district court from temporarily barring petitioners from publishing tape recordings of conversations between Noriega and his attorneys, before submission of those tape recordings for an in camera review, in order to enable the court to make the factual findings necessary to determine whether a prior restraint on publication is permissible.

In our view, the district court's orders—entered solely for the purpose of enabling an informed decision to be made under the First Amendment on the merits of Noriega's request for an injunction against publication—are not foreclosed by that same constitutional provision. Rather, as the four judges now to have considered the issue properly recognized, the clash between the First Amendment guarantee of a free press and the constitutional guarantees of fair criminal proceedings may be accommodated by temporarily preserving the status quo in order to allow the courts an opportunity to assess and balance the relevant interests at stake. Only then can the courts be certain that the significant constitutional interests on both sides of the balance are weighted appropriately.

In light of the sound and limited rulings of the courts below, the application for a stay and the petition for a writ of certiorari should be denied.

1. The narrow question presented is whether the First Amendment prohibited the district court from temporarily barring petitioners from publishing tape recordings of conversations between Noriega and his

attorneys, before submission of those tape recordings for an in camera review, in order to enable the court to make the factual findings necessary to determine whether a prior restraint on publication is permissible. As they did in the courts below, petitioners continue to hold fast (Appl. 11-27; Pet. 12-24) to a position that contains an inherent contradiction: petitioners refuse to produce the tapes to the district court so that the court can make the factual findings necessary to determine whether an injunction is justified; at the same time, petitioners contend that the district court may not enjoin publication without first making those findings.

Petitioners' position can be sustained only if this Court were prepared to conclude that injunctive relief could never be justified in this case, regardless of the contents of the tapes petitioners have and intend to publish. Petitioners submit that the First Amendment licenses their refusal to provide the district court with the means to assess the potential harm that publication of the tapes could cause. In other words, petitioners assert that, even if the contents of the tapes made it inescapably clear that publication would render it impossible to ensure Noriega—and the public—a fair trial,[9] the First Amendment would still preclude injunctive relief.

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[9] The specific kind and degree of the harm that may result from broadcasting the tapes depends almost entirely on the contents of the tapes that petitioners possess and intend to broadcast. The government cannot now be more specific with respect to the possible harm that could flow from publication of the tapes, because the government, like the courts below, does not know the contents of the material petitioners have and intend to publish.

Petitioners try to whipsaw the rationale of the courts below by treating as straw men the asserted interests in preserving

This Court's decisions do not sanction such an extreme vision of the First Amendment. The Court has long recognized that "the entry of a prior restraint on publication * * * [is] one of the most extraordinary remedies known to our jurisprudence." *Nebraska Press Ass'n*, 427 U.S. at 562; see, *e.g.*, *Near* v. *Minnesota*, 283 U.S. 697 (1931). Nonetheless, as made plain in *Nebraska Press Ass'n*, "[t]his Court has frequently denied that First Amendment rights are absolute and has consistently rejected the proposition that a prior restraint can never be employed." 427 U.S. at 570; see, *e.g.*, *New York Times Co.* v. *United States*, 403 U.S. 713, 714 (1971); *Organization for a Better Austin* v. *Keefe*, 402 U.S. at 419-420; see also *Seattle Times Co.* v. *Rhinehart*, 467 U.S. 20, 32 (1984). Just last Term this Court reiterated that " '[p]rior restraints are not unconstitutional *per se* * * *.' " *FW/PBS, Inc.* v. *City of Dallas*, 110 S. Ct. 596, 604 (1990) (opinion of O'Connor, J.) (quoting *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 558 (1975)).

Given the daunting remedy of a prior restraint, and the need to accommodate the right to a free press guaranteed by the First Amendment with other equally weighty constitutional interests,[10] this Court

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privileged communications and avoiding prejudicial pretrial publicity. See Appl. 17-27; Pet. 20-23. But that tactic does not obscure the fact that *if* the tapes contain highly prejudicial material or reveal defense strategy in some significant way, publication of those tapes could have a direct, adverse effect on the prospects for a fair trial. Petitioners' position is that the district court is not even permitted to find out if that is the case.

[10] As this Court has pointed out, for example, "[t]he authors of the Bill of Rights did not undertake to assign priori-

has recognized that the critical question is "whether the entry of * * * an order [restraining publication] on *the showing* made before the * * * court violated the constitutional guarantee of freedom of the press." *Nebraska Press Ass'n*, 427 U.S. at 541 (emphasis added); see *id.* at 562 ("whether the record supports the entry of a prior restraint on publication"). In other words, the searching constitutional inquiry this Court has demanded—focusing on the impairment of otherwise protected constitutional rights, the availability of alternative measures short of a prior restraint, and the effectiveness of the restraint, see *id.* at 562-568—requires (and presupposes) an adequate record from which the court can reasonably determine whether the particular case falls within the narrow category of cases in which a prior restraint is permissible. Indeed, in the *Nebraska Press Ass'n* case, the Court struck down an injunction against publication of information about a criminal defendant only after concluding that the probability of prejudice to the defendant's right to a fair trial "was not demonstrated with the degree of certainty our cases on prior restraint require." 427 U.S. at 569.

In light of these settled principles, the district court properly entered orders necessary to maintain the status quo pending the court's findings as to the nature of the tape recordings at issue. Without such temporary restraining orders, petitioners presumably would have published the tape recordings, which in turn would have rendered the request for injunctive relief moot. Although this Court has emphasized that a "prior restraint[] * * * bear[s] a heavy presump-

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ties as between [the] First Amendment and Sixth Amendment rights, ranking one as superior to the other." *Nebraska Press Ass'n*, 427 U.S. at 561.

tion against its constitutional validity," *New York Times Co.* v. *United States*, 403 U.S. at 714 (internal quotation marks and citations omitted), the Court has never held that a federal court may not ever exercise its authority to maintain the status quo *pending a determination whether a prior restraint is appropriate in a particular case.* To the contrary, this Court entered just such an order in the *Pentagon Papers* cases. See *New York Times Co.* v. *United States*, 403 U.S. 942 (1971); *United States* v. *Washington Post Co.*, 403 U.S. 943 (1971).[11]

Here, petitioners' request for emergency relief, although styled as an application for a stay pending the disposition of certiorari, at bottom seeks from this Court the functional equivalent of summary disposition of their claim on the merits, namely, that the First Amendment prohibited the district court from temporarily barring publication in order to enable the court to make the factual findings necessary to determine whether a prior restraint is permissible. If the district court's orders were stayed by this Court, petitioners would be free to publish the tape recordings and, in so doing, would render the controversy effectively moot. As shown above, this Court's decisions do not countenance such an inflexible and counterintuitive approach to the First Amendment. Moreover, in the past, this Court has not hesitated to preserve the status quo in analogous

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[11] Indeed, in the *Nebraska Press Ass'n* case, Justice Blackmun, sitting as Circuit Justice, denied an application for a stay to lift the state court's restraining order that essentially maintained the status quo pending further proceedings. See *Nebraska Press Ass'n* v. *Stuart*, 423 U.S. 1319, 1332-1333 (1975) (in chambers). And this Court later denied petitioners' application for a more extensive stay in that case. *Id.* at 1027.

cases in order to ensure an orderly and effective means of judicial review. *E.g.*, *Nebraska Press Ass'n* v. *Stuart*, 423 U.S. 1027 (1975); cf. *FW/PBS, Inc.*, 110 S. Ct. at 612 (Brennan, J., concurring in the judgment) (in licensing context, "any prior restraint in advance of a final judicial determination on the merits must be no longer than that necessary to preserve the status quo pending judicial resolution").

The critical point is that the First Amendment is part of the rule of law, not above it. It is certainly true that, under the First Amendment, a lasting prior restraint on publication may be justified only in the most extraordinary circumstances. But the rule of law requires permitting a court to determine if those circumstances exist. This may or may not be the rare case in which a lasting prior restraint is justified. The district court entered the challenged orders to find out. And those orders were expressly intended to be temporary in duration so the district court could promptly carry out its process of "expedited review." This, then, is a far cry from the situations that obtained in this Court's "prior restraint" cases. Accordingly, petitioners' application for a stay of the district court's orders should be denied.

2. The narrow issue actually presented by the petition for certiorari—whether the First Amendment prohibited the district court from temporarily barring publication in order to enable the court to make the factual findings necessary to determine whether a prior restraint is permissible—does not now warrant this Court's review. As explained above, the approach adopted by the district court and court of appeals for addressing Noriega's request for an extraordinary prior restraint on publication is both sensible and consistent with this Court's decisions.

And contrary to petitioners' sweeping submission (see, *e.g.*, Pet. 26-31), the decision below is not at odds with a host of other lower court decisions. In each of those decisions, the court had before it an adequate record—including at least a sufficient description of the material sought to be published—to undertake the requisite constitutional inquiry. See, *e.g.*, *CBS* v. *United States District Court*, 729 F.2d 1174 (9th Cir. 1983) (government surveillance tapes of criminal defendant); *Goldblum* v. *NBC*, 584 F.2d 904 (9th Cir. 1978) (Kennedy, J.) ("docudrama" film about convicted defendant's well-publicized fraud scheme).[12] Here, by contrast—in light of the peculiar circumstances presented by petitioners' having tape recordings whose contents are unknown—the courts below had no such record with which to make the appropriate inquiry. Nothing in the First Amendment, this Court's decisions, or the decisions of lower federal and state courts, requires the difficult issues surrounding a motion for an injunction barring publication to be resolved in such a manner.[13]

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[12] The fact that, in cases such as *CBS* and *Goldblum*, the courts did not have access to the tapes and film in question is irrelevant, since the courts otherwise had sufficient information to assess the significance of the materials at issue.

[13] Petitioners assert in passing (Pet. 25) that the district court's restraining orders are unconstitutionally vague. The record belies that suggestion, where petitioners themselves have told the district court that they fully understand the scope of those orders, *i.e.*, that they would not "telecast any attorney-client privilege conversations" pending disposition of the case before this Court. Pet. App. 111a. Indeed, on November 13, petitioners reiterated before the district court that they understood that they "are under a Court Order restraining us from telecasting any privileged attorney-client communications between Mr. Noriega, General Noriega and his lawyers." Pet. Supp. App. 17.

In the end, petitioners and amici trumpet that this case poses a conflict between free press and fair trial. And they have no doubt as to how that conflict should be resolved. But the purpose of the narrow orders entered by the district court was not to protect the parties' right to a fair trial, it was rather to determine the extent to which that right was threatened and, if so, what steps—if any—were necessary and appropriate to protect it. There will be time enough for the lower courts and this Court to consider whether a lasting prior restraint over publication of privileged attorney-client communications is permissible to ensure a fair trial, when we know whether petitioners' tapes contain such communications, and whether—given their contents—such an injunction would be the only effective alternative. We do not yet know that. Review by this Court is thus, at the least, premature.

In short, petitioners ask this Court to resolve the questions they present in a vacuum. Their request is all the more remarkable for its sweep. In their view, this Court should now hold that the First Amendment right to publish prevails *no matter what* might be on the tapes and *no matter what* the effect of publication might be. Petitioners make generous use of the term "unprecedented," see, *e.g.*, Pet. 8, but it is, upon close scrutiny, the ruling they seek from this Court—that a federal court cannot even ask what it is that will be published in considering whether publication is protected—that would be truly unprecedented. The Court should decline the rushed invitation to embrace that vision of the First Amendment.

CONCLUSION

The application for a stay of the district court's orders pending the disposition of the petition for a writ of certiorari and the petition for a writ of certiorari should be denied.

Respectfully submitted.

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